

# Testimony: Committee on the Judiciary (Subcommittee)

## West Virginia should reject call for Constitutional Convention

Ted Boettner | Executive Director  
2/19/2019



Chair Shott and Members of the Committee:

Thank you for the opportunity to provide testimony on proposals for an Article V Convention of States. The West Virginia Center on Budget and Policy is a nonpartisan organization dedicated to using research and analysis to support an informed public dialog and advance policies that build broadly shared prosperity West Virginia. We urge the Committee to reject proposals that call for an unprecedented convention that could threaten our constitutional stability and economic health.

At no time in our nation's history has an Article V Convention of States been used to make amendments to the Constitution. While the U.S. Constitution has been amended 27 times, there has never been a convention of states to propose amendments (unless you count the original one in 1787 that went well beyond its mandate). This would be an unprecedented step that would endanger many of the freedoms and rights that are enshrined in the Constitution. That's because there are no rules in the US Constitution to protect us from big changes to our constitutional rights.

Despite reassurances from some of the groups promoting these resolutions, prominent legal scholars and jurists from across the political spectrum agree that a convention would open up the Constitution to radical and harmful changes, everything from our right to vote to free speech could be up for grabs. As constitutional scholar and Harvard Law School Professor Laurence Tribe pointed out, "what you're doing is putting the whole Constitution up for grabs."

Erwin Chemerinsky, who another leading constitutional scholar and dean of the law school at the University of California, Irvine – wrote, "Because it never has happened, no one knows how the convention would operate. Would it be limited to considering specific proposals for change offered by the states or could it propose a whole new Constitution?"

The executive editor of the Heritage Foundation's guide to the Constitution, Mathew Spalding, told Pennsylvania lawmakers recently: "I do not believe that an Article V convention is the answer to our problems. The lack of precedent, extensive unknowns, and considerable risks of an Article V amendments convention should bring sober pause to advocates of constitutional reform contemplating this avenue."

Since there is no clear procedure to limit the process, scope, or outcome of a constitutional convention it could write its own rules, sets its own agenda, and it could choose a new ratification process. This is because no other body, including the courts, has clear authority over a convention.

The most critical risk is that the country and our state could be thrown into extreme turmoil due to the lack of legal agreement about what is involved in a convention of the states. While Article V of the

U.S. Constitution provides for the option of amendment via a convention, there is no direction on how this option is to be implemented.

It is also highly likely that a convention held today would be a media circus and a lightning rod for powerful interest groups of various sorts. The pressure on delegates would be immense, and intense negotiations and horse-trading among delegates would be likely. States that did not sign on to a convention call would nevertheless demand a voice, and a vote, perhaps based on the size of their populations.

While many West Virginians may be angry and frustrated today, we should be careful that our anger and frustration not cause us to take steps that permanently damage the country and diminish its promise. The process we have used for amending the Constitution has served us well, protecting the country's founding document through times much more difficult than today. Let us have the fortitude and prudence of previous generations and avoid placing the Constitution at grave risk.

West Virginia lawmakers should immediately rescind HCR 36 that was passed in 2016 and reject further calls for a constitutional convention.

## **APPENDIX:**

### **Legal Scholars Warn of the Dangers of an Article V Convention**

"[T]here is no way to effectively limit or muzzle the actions of a Constitutional Convention. The Convention could make its own rules and set its own agenda. Congress might try to limit the convention to one amendment or one issue, but there is no way to assure that the Convention would obey." – [Warren Burger](#), **Chief Justice of the U.S. Supreme Court (1969-1986)**

"I certainly would not want a constitutional convention. Whoa! Who knows what would come out of it?" – [Antonin Scalia](#), **Associate Justice of the U.S. Supreme Court (1986-2016)**

"There is no enforceable mechanism to prevent a convention from reporting out wholesale changes to our Constitution and Bill of Rights." – [Arthur Goldberg](#), **Associate Justice of the US. Supreme Court (1962-1965)**

"First of all, we have developed orderly procedures over the past couple of centuries for resolving [some of the many] ambiguities [in the Constitution], but no comparable procedures for resolving [questions surrounding a convention]. Second, difficult interpretive questions about the Bill of Rights or the scope of the taxing power or the commerce power tend to arise one at a time, while questions surrounding the convention process would more or less need to be resolved all at once. And third, the stakes in this case in this instance are vastly greater, because what you're doing is putting the whole Constitution up for grabs." – [Laurence Tribe](#), **professor of constitutional law at Harvard Law School**

"The bigger threat is that a constitutional convention, once unleashed on the nation, would be free to rewrite or scrap any parts of the U.S. Constitution. Do we really want to open up our nation's core defining values to debate at a time when a serious candidate for the White House brags about his enthusiasm for torture and the surveillance state, wants to "open up" reporters to lawsuits, scoffs at the separation of powers and holds ideas about freedom of religion that are selective at best?" – [David Super](#), **professor of law at Georgetown University**

"Note what [Article V] does not say. It says not a word expressly authorizing the states, Congress, or some combination of the two to confine the subject matter of a convention. It says not a word about whether Congress, in calculating whether the requisite 34 states have called for a convention, must (or must not) aggregate calls for a convention on, say, a balanced budget, with differently worded calls arising from related or perhaps even unrelated topics. It says not a word prescribing that the make-up of a convention, as many conservatives imagine, will be one-state-one-vote (as Alaska and Wyoming might

hope) or whether states with larger populations should be given larger delegations (as California and New York would surely argue).” - [Walter Olson](#), senior fellow at the **Cato Institute’s Center for Constitutional Studies**

“Danger lies ahead. Setting aside the long odds, if California and 33 more states invoke Article V, there’s a risk that we’d end up with a “runaway” convention, during which delegates would propose amendments on issues including abortion, gun rights and immigration.” – [Rick Hasen](#), **Chancellor’s Professor of Law and Political Science at the University of California, Irvine**

“Holding a Constitutional convention when the U.S. is embroiled in extremely toxic, uninformed and polarized politics is a really, really bad idea.” – [Shelia Kennedy](#), **professor of law and policy at Indiana University Purdue University Indianapolis**

“But no rule or law limits the scope of a state-called constitutional convention. Without established legal procedures, the entire document would be laid bare for wholesale revision. Article V itself sheds no light on the most basic procedures for such a convention. How many delegates does each state get at the convention? Is it one state, one vote, or do states with larger populations, like California, get a larger share of the votes? The Supreme Court has made at least one thing clear — it will not intervene in the process or the result of a constitutional convention. The game has neither rules nor referees.” - [McKay Cunningham](#), **professor of law at Concordia University**

"The result will be a disaster. I hate to think of the worst-case scenario. At best, the fight over every step along the way would consume our country's political oxygen for years." – [David Marcus](#), **professor of law at the University of Arizona**

"At present, there are no rules regarding who can participate, give money, lobby or have a voice in a constitutional convention. There are no rules about conflicts of interest, disclosure of who is giving or expending money. No rules exist that address political action committees, corporate or labor union involvement or how any other groups can or should participate. Not only might legitimate voices of the people be silenced by convention rules, but special interests may be given privilege to speak and affect the deliberations...there are no rules limiting what can be debated at a constitutional convention. Given the potential domination by special interests, who knows the result?" - [David Schultz](#), **political science and election law professor at Hamline University**

“An Article V convention might propose an amendment to restore or expand the liberties of the American people, but it also could propose an amendment that diminishes the liberties of the American people, or of some of the people. “ – [John Malcolm](#), **director of the Heritage Foundation’s Edwin Meese III Center for Legal and Judicial Studies**

“But nothing in the Constitution limits such a convention to the issue or issues for which it was called. In other words, anything and everything could be on the table, including fundamental constitutional rights. Nor are there any guarantees about who would participate or under what rules. Indeed, for these reasons, no constitutional convention has been called since the first in 1787.” - [Helen Norton](#), **professor and Ira C. Rothgerber, Jr. Chair in Constitutional Law at the University of Colorado, and David Super**, **professor of law at Georgetown University**

“The lack of clear rules of the road, either in the text of the Constitution itself or in historical or legal precedent, makes the selection of the convention mechanism a choice whose risks dramatically outweigh any potential benefits.” – [Richard Boldt](#), **professor of law at the University of Maryland**

“We live in deeply partisan times. There are no certainties about how a constitutional convention would play out, but the most likely outcome is that it would deepen our partisan divisions. Because there are no clear constitutional rules defining a convention’s procedures, a convention’s “losers” may deem illegitimate any resulting changes. Regardless of the ultimate outcome, the process itself would likely worsen our already vicious national politics.” – [Eric Berger](#), **associate dean professor of law at the University of Nebraska College of Law**

“There are no such guarantees. This is uncharted territory...We should not now abandon the very document that has held us together as a nation for over two and one quarter centuries. Rewriting the Constitution is a dangerous errand that would not only unravel the legal ties that have kept us together for so long but would also undermine our sense of national identity and the way that view ourselves as a people.” – [William Marshall](#), **professor of law at University of North Carolina**

"Terrible idea... Today's politicians don't have the timeless brilliance of our framers. If we were to rewrite our constitution today, we wouldn't get a particularly good one." – [Adam Winkler](#), **professor of constitutional law and history at the University of California, Los Angeles**

"I believe it's a time for constitutional sobriety. It's a time to keep our powder dry and not to move on an uncharted course. We are not the founding fathers. This would be disastrous." – [Toni Massaro](#), **constitutional law professor at the University of Arizona**

"Having taught constitutional law for almost 40 years, and having studied constitutions from around the globe, I have difficulty imagining anything worse." - [Bill Rich](#), **professor of law at Washburn University in Topeka, Kansas**

"There are no constitutional limits on what the convention could do, no matter what the states say going into it." - [David Schwartz](#), **professor of law at the University of Wisconsin Law School**

"The Constitution allows for the calling of conventions on a petition of enough states, but not limited conventions of enough states. If the delegates decide they don't want to be bound by the (state) resolution, they are right that they can't be bound." - [Richard H. Fallon Jr.](#), **constitutional law professor at Harvard University**

"Once you open the door to a constitutional convention, there are no sure guidelines left. This is the constitutional equivalent of opening a can of worms." - [Miguel Schor](#), **constitutional law professor at Drake University School of Law**

"Thus, neither the states nor Congress may limit the convention to specific subjects. While the goal to propose a balanced budget amendment may provide guidance to the convention, it would not have the force of law... Put simply, the rewards of any constitutional change is not worth the risks of a convention." - [Sam Marcossou](#), **professor of law at the University of Louisville**

"Even more frightening is that the entire Constitution will be in play during a convention. The First Amendment could disappear, so could gun rights. There is no guarantee that any of our current constitutionally protected rights would be included in a new constitution. The only guarantee is that all of those rights would be imperiled." - [Mark Rush](#), **the Waxberg Professor of Politics and Law at Washington and Lee University in Lexington**

"Most significantly, we advise the Legislature that a federal constitutional convention called with this resolution could potentially open up each and every provision of the United States Constitution to amendment or repeal. In other words, a federal constitutional convention could propose amendments to eliminate the protections of free speech; the protections against racial discrimination; the protections of freedom of religion; or any of the other myriad provisions that presently provide the backbone of American law." – [March 2018 legislative testimony of Russell Suzuki, Acting Attorney General, and Deirdre Marie-Iha, Deputy Attorney General, of the state of Hawaii](#)

"Whatever one thinks about these proposed amendments, trying to pass them through an Article V convention is a risky business. The Constitution does not specify how the delegates for such a convention would be chosen, how many delegates each state would have, what rules would apply at the convention or whether there would be any limits on what amendments the convention could consider. A convention that was called to address a specific issue, such as budget deficits, might propose changes to freedom of speech, the right to keep and bear arms, the Electoral College or anything else in the Constitution. There is no rule or precedent saying what the proper scope of the convention's work would be." - [Allen Rostron](#), **associate dean for students, the William R. Jacques Constitutional Law Scholar, and a professor at the University of Missouri**

"Whether I like or dislike the specific proposal is not the point — the point is that a constitutional convention is a risky and potentially dangerous way to propose amendments." - [Hugh Spitzer](#), **professor of law at the University of Washington**